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No. 20

IN THE

Supreme Court of the United States

October Term, 1954

JAMES R. ELLIS, as President of the Yonkers Committee for Peace, an unincorporated association,

Petitioner,

—against—

WILLIAM DIXON, *et al.*, as members of the Board of Education of the City of Yonkers, etc.,

Respondents.

ON A WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, SECOND DEPARTMENT

SECOND SUPPLEMENTAL BRIEF OF PETITIONER ON REARGUMENT

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(1)

This brief is submitted to accompany the exhibit herewith enclosed, which were requested by the Court. The exhibit consists of the petitioner's application for leave to appeal to the Court of Appeals. Also enclosed, as an aid

to the Court is the respondents' brief in opposition to that application.

Preliminarily, it should be stated that at no time did counsel for the respondents raise the question that Mr. Justice Harlan raised at the argument, to wit, that the failure of the petitioner to avail himself of an alternative remedy of direct appeal to the Court of Appeals instead of by application for leave to appeal left open a state law question.

(2)

The exhibits will indicate that in the Court of Appeals, as in all courts, the petitioner directed his petition to the constitutional issues involved. From the nature of the case this could be the only intelligent attack to the problem. It was the core of the allegations of the petition in the lower court that the right to speak was denied in violation of constitutional guarantees. In the Appellate Division this same argument was again presented along with the argument that the petitioner correctly appealed to the courts for relief. The Appellate Division held that petitioner's contention was correct in that he had a right to appeal to the courts. That is the law of the case now. The Appellate Division also held, however, that petitioner had no legal right to redress, thereby supporting respondents' contention in that court, that the respondents had absolute discretion to determine who was to be afforded the right to use the school building for speech.

In the Court of Appeals, the identical questions were presented by the petitioner, as the exhibit will show. In fact, in "Respondents' Brief in Opposition to Motion for

Leave to Appeal to the Court of Appeals," enclosed herewith, at page 5, under "Conclusion" the respondents state, "The questions raised by petitioner's attorney in this application have all been given due consideration by the Appellate Division and an appeal to this Court is not required in the interest of substantial justice."

That brief in opposition directed itself to two points. First, because the board of education has discretion to choose who may use the school facilities and that they exercised their discretion reasonably against these petitioners. Secondly, since the respondents' power was discretionary, the petitioner has failed to show he had a legal right.

Nowhere in that opposition brief is there any objection of any procedural nature.

Petitioner's application for leave to appeal contends as he had argued in all prior courts and as he does in this Court, that there was no discretion in respondents to choose who may speak and what they may speak about, so long as there is no clear, present and imminent danger to the community and no law is violated, and, furthermore, there are no standards fixed that circumscribe and define the respondents' discretion. Since this is a country of laws and not men, it is necessary that clear rules of conduct be set forth. Furthermore, petitioner has argued that he was discriminated against because others have been permitted to use the school facilities for assembly and discussion and not he.

At no time either by briefs or at the arguments, have the respondents or *amicus* contended that this Court is with-

out jurisdiction to decide this case, because of any possible remaining state questions. Since the granting of a writ is attended with care and requires the approval of at least four justices, a presumption of jurisdiction should exist.

Because the problem presented in this review is a recurrent one, as was indicated by the petition for the writ, there should be enthusiasm, rather than resistance to settle this question.

This is not said out of weakness or doubt of petitioner's jurisdictional position. Rather, since petitioner has from the very beginning raised the federal constitutional question, and has pursued it until he exhausted his state remedies, jurisdiction rests in this Court to redress the denial of constitutional protections.

(3)

In New York, an aggrieved person may appeal to the Court of Appeals in two *alternative* ways. He may appeal as a matter of right where a constitutional question is involved (Section 588 sub. (a) New York Civil Practice Act), or he may apply for leave to appeal by permission (Section 589 of that law). There is nothing in New York law that requires that an appeal be pursued as of right. Indeed, there is an element of risk involved.

A lawyer may feel that there is an important constitutional question involved, yet that Court might regard it as insubstantial or not "directly" involved. That Court may make such disposition upon motion to dismiss before argument is set (see for instance, *Matter of Hill* v. *Lyman*, 306 N. Y. 739).

This Court, however, may be of a different opinion and regard the constitution question as substantial.

Therefore, lawyers with considerable experience in that Court will in a given case not speculate or gamble with an appeal as a matter of right, but will move for leave to appeal. This is the practice suggested and encouraged by this Court in *Stratton* v. *Stratton*, 239 U. S. 55, at page 56, bottom line.

If that Court should determine that the appeal is available as a matter of right, it may deny leave, and state that its denial is based on the existence of the right to appeal (see, for instance, *Matter of Hecht* v. *Monoghan*, 305 N. Y. 800). But the Court of Appeals in denying leave to appeal did not state in this case that an appeal lay as a matter of right (R. p. 22).

That leave may be granted and considered on constitutional questions is authorized by Section 592 sub. 5(d) which reads as follows:

> "An appeal taken to the Court of Appeals pursuant to permission shall not be dismissed upon the ground that the appeal would lie as of right and was not taken within the time limited for an appeal as of right, provided the proceedings to obtain such permission was begun within the time limited for an appeal as of right."

This answers any question that appeal on constitutional grounds cannot be by permission, as *amicus* contends in its brief.

The *amicus* brief when citing Section 589, "Appeal by Permission" on page 3 of its brief, fails to separate with

distinction subdivision (a) of subdivision 3, which is the subdivision that applies to this case.

Subdivision (a) reads as follows:

> "either
>
> (a) by permission of the appellate division granted before application to the court of appeals for permission to appeal, and in case of refusal of such permission, by permission of the court of appeals."

There is no qualification to this permissive alternative procedure. Nor does subdivision (b) cited by the *amicus* have any application here. That subdivision applies to a case where application is made in the first instance to the Court of Appeals, by-passing the Appellate Division. That is not what happened in this case.

For example, the Gold Clause Case of *Norman* v. *Baltimore & Ohio Railroad Co.*, 290 U. S. 240 was reviewed in the Court of Appeals *by permission* granted by the New York Appellate Division, under the statute similar to Section 589 sub. 3 sub. (a). There was without question a substantial and important constitutional question involved, which constitutional question could have been reviewed as a matter of right by the Court of Appeals. But the undersigned, out of abundance of caution applied for permission. The Court of Appeals found no fault with that procedure. This Court accepted jurisdiction.

Nash v. *Long*, cited by *amicus* hasn't the slightest bearing on this problem. It concerned itself with the jurisdiction of the Court of Appeals with respect to appeals to it from an inferior court of limited jurisdiction like the Municipal Court, when the Appellate Division denies

leave. In such cases the statute specifically provides that no further appeal may be granted by leave of the Court of Appeals. See Section 589, C.P.A., sub. 1 and sub. b. That is not the situation here.

Where the Court of Appeals has dismissed an application for leave to appeal, its rationale is *not* that the court is without jurisdiction, but rather, because it is *unnecessary*. See for example, *Matter of Fineman*, 258 N. Y. 423 and *Matter of Van Vliet*, 224 N. Y. 545. This clearly and unmistakably shows that an appeal by permission is an alternative proceeding and is within the jurisdiction of that court.

The undersigned communicated with Mr. Karger, author of the book quoted by the amicus, and Mr. Karger assured the undersigned that the statement verbatim in this brief of the practice in New York is correct, and that petitioner's practice in this case conforms thereto.

Therefore, the petitioner did all he could as Niemotko did (*Niemotko* v. *Maryland*, 340 U. S. 268) to be afforded an opportunity to use public facilities for speech. He exhausted his state remedies. To hold otherwise would mean that an aggrieved person *must* first appeal as of right and then, if dismissed, apply for leave. It would leave no alternative, even if New York law provides an alternative remedy. This is not necessary any more than the requirements in this Court. In this Court a litigant may apply by a writ of certiorari for review, even if he could have filed an appeal. Of course, this Court could dismiss and state that appeal lies. But that does not bar his procedure by a writ in the first instance.

Should petitioner have been required after the denial of leave to appeal to then file an appeal as a matter of right?

First of all, the time of petitioner to appeal as of right had expired, because sixty days had elapsed since the judgment of the Appellate Division had been entered and served (Section 592, subdivision 1, C.P.A.) The judgment of affirmance was served on May 26, 1953, and the Court of Appeals denied the motion on October 2, 1953 (R. p. 23). There is no provision for an extension of time, except in the case where the order of the Court of Appeals denies leave on the ground that an appeal lies as a matter of right (Section 592, subdivision 5 (a)). Secondly, there would seem to be no intelligence in appealing as a matter of right after leave was denied. Since the Court of Appeals did not deny the application on the ground that an appeal lay as a matter of right, it could reasonably be assumed by counsel that the Court of Appeals failed to find substantiality in the appeal on the merits. Therefore, there would be no sense in counsel going to the expense, waste of time and entanglement with procedural issues to then file an appeal as a matter of right. In the exercise of intelligence he can assume that if he was rejected he will remain rejected. To bring the matter closer to home—if this Court denied a petitioner a writ of certiorari it could not be expected that the petitioner would or should file an appeal.

Thirdly, if exhausting *alternative* state remedies means that a litigant is required to pursue every device open to him in the highest state appellate court, then it could be argued that an appellant had not exhausted his state remedies unless he had asked the highest state court for reargument of the decision there against him. It could even be urged in that case, that he should be required to

even apply for a second reargument or a third reargument. It is submitted that neither reason nor the precedents of this court require the pursuit of every conceivable remedy in the state courts. To do otherwise, would make a mockery of the jurisdiction of this Court, as well as place at a disadvantage the litigant who does not acquaint himself with every conceivable remedy and device available in the state court. It is sufficient that he exhausts his state remedies by pursuing a remedy, be it an alternative one, to gain the highest court's ear for redress of his grievance. See, *Norfolk, etc.* v. *Virginia*, 225 U. S. 264; *Honeyman* v. *Hanan*, 300 U. S. 14.

In *Stratton* v. *Stratton*, 239 U. S. 55, this Court encouraged counsel to pursue motions for leave to appeal to be on the safe side of jurisdiction in constitutional cases. This Court there said at page 56, bottom line, "Indeed, conforming to the rule thus thoroughly established, the practice for years has been in the various States where discretionary power to review exists in the highest court of the State to invoke the exercise of such discretion in order that upon the refusal to do so there might be no question concerning the right to review in this court. See *West. Un. Tel. Co.* v. *Grovo*, 220 U. S. 364; *Norfolk Turnpike Co.* v. *Virginia*, 225 U. S. 264; *St. Louis San Francisco Ry. Co.* v. *Seale*, 229 U. S. 156."

In *McMaster* v. *Gould*, 276 U. S. 284, this Court had occasion to view the New York practice as it then existed. But there, the *converse* situation was presented. There the petitioner boldly or mistakenly took his appeal as of right to the Court of Appeals. It was dismissed because it did not lie as of right. He came to this Court on certiorari.

This Court dismissed the writ for want of jurisdiction. That was the only disposition that could be made, because the petitioner had not applied for permission to appeal. But in the present case petitioner did apply for leave and it was refused. Petitioner's counsel was less bold than McMaster's and asked for permission in the first instance.

This shows how bedeviled and entangled the situation would become if petitioner's contentions are not sustained. A litigant would not know with any assurance where he stood. Contrary to accepted practice in this Court's requirment that he must make an attempt to be heard, he would only be safe if he pursued both remedies. He would be required to file an appeal, expend money for printing and costs, and if dismissed, ask for leave. *Stratton* says he should however preferably follow the latter course in the first instance.

Simkins, Federal Practice, Third Edition, Section 965, states: "This means that the highest state court in which a decision could be had must, in some form, have acted upon the case, either by reviewing it or *refusing to review it.*" * * * "In order that the jurisdiction of the Supreme Court of the United States may attach, *an attempt* must have been made to have the case considered by the highest court of the state in which a decision could be had."

Respectfully submitted,

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